

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

Review of the Prime Time
Access Rule, Section 73.658(k)
of the Commission's Rules

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MM Docket No. 94-123

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF THE
UPN AFFILIATES ASSOCIATION

The UPN Affiliates Association hereby submits its comments in the above referenced rule making proceeding¹ with respect to §73.658(k) of the Commission's Rules and Regulations (the "PTAR").

The UPN Affiliates Association (the "Association") is a newly formed non-profit incorporated association of broadcast television stations affiliated with the emerging United Paramount Television Network (the "UPN").² UPN commenced service on January 16, 1995 with the distribution and broadcast of two hours of original first run prime time programming on Monday and Tuesday nights (8:00 to 10:00 p.m. E.T. on both nights) and a weekend movie (12:00 to 2:00 p.m. L.T. Saturday). As of this date, 114 stations are affiliated with the UPN, of which 67 stations are primary affiliates and 47 stations are secondary affiliates. UPN has an affiliate in all but four of the top 50 markets and all but 16 of the next 50 markets.

¹ *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, FCC 94-266 (adopted October 20, 1994, released October 25, 1994)(the "NPRM").*

² The UPN Affiliates Association is a new voluntary association to which all UPN affiliates are invited to join. As of this date, all affiliates are not yet members of the Association.

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UPN is truly in its infancy and its survival is far from certain.³ The development of a network is a slow and incremental process. Its success is dependent upon the maintenance of financially healthy affiliates and a financially healthy network able to develop programming capable of delivering acceptable levels of viewership. As demonstrated below, the maintenance of the PTAR is critical to those objectives.

I. INTRODUCTION

"[T]he Commission created PTAR as a reaction to a market place that it believed was functioning without sufficient competition and had yielded inadequate levels of diverse programming."⁴ PTAR sought to correct those deficiencies by: (1) making it easier for independent producers to sell their programming to financially stronger network affiliates, without the networks acting as gatekeeper, thereby strengthening the independent producers and creating new ones and increasing the amount of diverse programming available to the public; (2) increasing affiliate autonomy and reducing network dominance; and (3) increasing the number and financial strength of independent television stations so that they would be purchasers of independently produced programming which would foster the emergence of new networks.⁵ The reasons that existed in 1970 for creating PTAR remain applicable today. The maintenance of a healthy, diverse television broadcast industry is dependent upon the retention of both elements of the rule: the network restriction, which limits the number of prime time hours that the networks

³ The Commission characterizes UPN as an "incipient" network. NPRM at ¶ 47.

⁴ NPRM at ¶ 31.

⁵ *Id.*

may provide programming to their affiliates; and the off-network restriction, which prohibits network affiliates in the top 50 markets from airing off-network programming during the access period.

II. THE TV BROADCAST INDUSTRY TODAY

The Commission correctly recognizes that "substantial changes have occurred in the intervening 20 years since the [PTAR] was adopted. . . ."⁶ Foremost, the number of independent television stations has grown from 82 in 1970 to 450 today.⁷ Today, 230 of the independent stations are licensed to the top 50 markets.⁸ In the top 25 markets, there are no fewer than three independent stations in each market and there are no fewer than five independent stations in all but three of those markets.⁹ In the top 50 markets, there are no fewer than two independent stations in each market and there are no fewer than four independent stations in all but 15 of those markets.¹⁰ Significantly, however, 54 VHF channels and 223 UHF channels remain vacant.¹¹ First run syndicated programs rather than off-network shows dominate the ratings in the top 50 markets and 18 of the top 25 most popular syndicated programs were first run.¹² Network television has also changed

⁶ *Id.* at ¶ 3.

⁷ *Id.* at ¶ 16.

⁸ *Television and Cable Factbook, Services 1995*, I-72.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Television Channel Utilization*, June 30, 1994, released August 26, 1994.

¹² NPRM at ¶ 19.

significantly. While ABC, CBS and NBC had affiliates in all of the significant television markets in 1970 and have affiliates in virtually every television market today,¹³ the nature of the network/affiliate contractual relationship has changed substantially. In 1970, the FCC rules limited the term of a network affiliation agreement to two years; but, in 1989 in response to the networks' desires, the Commission eliminated that restriction.¹⁴ Elimination of that restriction is important today as the networks enter into long-term (ten years in some cases) affiliation agreements with multiple owners.¹⁵ Further, the Commission has modified the multiple ownership rules to increase the number of television stations a single entity may own or control.¹⁶ The Commission now proposes to increase that limit even further, creating even larger networks with increased power *vis-a-vis* their affiliates and program producers and syndicators.¹⁷ The network picture has also change with the birth of Fox, which has grown into, as characterized by the Commission,

¹³ In 1970, ABC, CBS and NBC had 159, 192 and 273 affiliates, respectively. *The Broadcasting Yearbook 1970*, pp. E-9, E-11 and E-15. Today, those numbers are ABC 230, CBS 200 and NBC 194, respectively. *The Broadcasting and Cable Yearbook 1994*, pp. G-63, G-64 and G-67.

¹⁴ *Elimination or Modification of Section 73.658(c) of the Commission's Rules*, 4 FCC Rcd 2755 (1989).

¹⁵ *E.g.*, ABC's agreement with five stations licensed to Scripps Howard and five stations licensed to Young Broadcasting and CBS's agreement with five stations licensed to Group W and two stations licensed to Gaylord.

¹⁶ *See Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C. 2d 17 (1984), *recon. granted*, 100 F.C.C. 2d 74 (1985).

¹⁷ *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, *Further Notice of Proposed Rulemaking*, FCC 94-322 (adopted December 15, 1994, released January 17, 1995).

a "near" network.¹⁸ Today, UPN and the Warner Brothers networks are providing limited programming to a lesser number of affiliates than the other networks. However, their expansion will create an increased demand for general audience programming and their successful programming will be available for subsequent syndication.

The television program production business has been changed significantly since 1970. ABC, CBS and NBC have been limited by the Commission's financial/syndication ("fin/syn") rules; however, the Commission has scheduled the elimination of those long standing restraints which prohibit the networks from syndicating programming or holding continuing financial interests in programming once it enters the syndication market.¹⁹ The Commission cannot ignore the practical realities of the networks controlling the syndication of their off-network programming and their future negotiations with competitive independent stations for the purchase of that programming. PTAR stands as one of the last significant safeguards for the preservation of independent stations.

III. THE NETWORK RESTRICTION SERVES THE PUBLIC INTEREST

There is little doubt that, if the network restriction is lifted, the networks will take back the fourth hour of prime time. As noted above, the networks have increased power over their affiliates with long term affiliation agreements and increased compensation levels that bind the affiliates. It is believed that the

¹⁸ NPRM at ¶ 48. In 1994 prior to the recent affiliate changes, Fox had 19 VHF affiliates and 121 UHF affiliates. *The Broadcasting and Cable Yearbook, 1994*, p. G-65.

¹⁹ See *Second Report and Order*, 8 FCC Rcd 3282 (1993), *recon. granted in part and denied in part*, 8 FCC Rcd 8270 (1993).

network affiliates will oppose the elimination of the network restriction in their comments in this proceeding. If the networks take back the access hour, the approximately 600 affiliated stations, which are now broadcasting programming they individually have selected, will be broadcasting the programming chosen by their networks, and program diversity will be reduced. Clearly the local station is in the best position to determine the programming which best satisfies local tastes.²⁰ On the other hand, the network programming addressing the national audience would be tailored to meet the most popular national tastes. Further, to the extent the network programming is produced in-house, the public will lose the voices of the independent producers.

The loss of the access period will obviously weaken independent program producers. While the independent producers are stronger today than in 1970, their continued financial health is necessary to maintain the quality and quantity of first run programming now available to the broadcast industry. This is particularly so during the next several years as the networks produce programming for syndication with the demise of the fin/syn restrictions. The Commission's admonition in the fin/syn proceeding is equally applicable with regard to PTAR. The Commission stated:

Historically, the principle behind our network syndication restraints has been to ensure that

²⁰ The Commission opines that "it seems increasingly unlikely that the networks would attempt to force their affiliates to take unpopular programs or programs necessarily different from those the affiliates themselves would choose." NPRM at ¶ 42. The network programming would not be "unpopular" programming, rather it would be general audience programming less likely to deal with the diversities associated with any one market (e.g., large minority populations).

alternative, non-network broadcast outlets receive access to the quality programming that they need to survive. We have been concerned that networks acting as syndicators would unfairly influence the program distribution market to the benefit of their affiliates and the detriment of competing independent stations. . . . [B]efore we remove all restrictions, we want to be certain that such an action will not harm local independent stations. For we are concerned that the harm that may result if we are wrong, would most greatly affect independent stations and the significant role they play in providing service to the public.²¹

If independent television is to survive in a healthy state, PTAR must be retained until the full ramifications of the elimination of the fin/syn restrictions are known.

Retention of the network restriction is also important to maintain a level playing field for programs competing during the access period. Under the prime time limitation, the programs broadcast during the access period compete for viewers on a basis that is as equal as is possible given the general VHF/UHF disparity with which independent stations are generally saddled.²² Presently, each station in a market, whether affiliated or independent, is responsible for selecting the programs to be broadcast during the access period and the promotional efforts to support that programming. Were the networks to program that time, locally selected programming would have to compete with the national mass appeal programming selected and supplied by the networks. The competition would not be on an even footing as the programming of the independents would be faced with

²¹ *Second Report and Order*, 8 FCC Rcd at 3320.

²² The Association's members can attest to the UHF disadvantages. Cable carriage, which is not universally available or utilized by their audiences, does not place them on an even footing with the VHF stations with which they must compete. Further, in the event "must carry" is overturned on its pending appeal, independent stations will be further disadvantaged. In such a case, PTAR would be even more critical to survival.

the heavy on-air and off-air promotion networks would undoubtedly use to garner viewership during the access period.

Under PTAR, the access period is the time when independent stations are the most competitive with affiliates and derive substantial proportions of their advertising revenues. The period 6 to 8 p.m. "is the single greatest revenue producing period for most independent stations."²³ The Association's members must maintain their revenue base from this period if they are to remain financially viable and the necessary base for UPN. PTAR has now begun to bear fruit; to eliminate it at this time, would be to kill the plant before the fruit has ripened. The public interest is better served by the preservation of independent television than by further strengthening network television, which has been recently awarded the benefits of relief from the fin/syn restrictions.

IV. RETENTION OF THE OFF-NETWORK RESTRICTION SERVES THE PUBLIC INTEREST

It is axiomatic that no network can survive without access to the top 50 markets. It is equally true that the continued existence of UPN is predicated upon the viability of its top 50 market affiliates. In order for the UPN affiliates to continue to support UPN, as it searches for first run programs and a program mix that will sustain an acceptable level of viewership, affiliates must remain financially strong. To this fledgling group of UPN affiliates, PTAR is the "nail" that holds all the critical

²³ Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162, August 1, 1990, at pp. 18-19.

pieces together.²⁴ To remain financially strong, the UPN top 50 affiliates must compete successfully against the stronger network affiliates which dominate those markets. The access period provides an avenue in prime time when the Association's members can counter-program tested off-network shows with known audience potential against the successful first run syndicated shows which are purchased by the primary network affiliates. The popular off-network fare also enables the Association's members to carry over audience viewership to the first run programming delivered by UPN. The off-network restriction, therefor, accomplishes two public interest goals: viz., financial support to independent stations and top 50 market buyers and audiences for first run syndicated programming. Both sustain increased diversity and localism, the capstones of broadcast services vis-a-vis cable, satellite and other video delivery systems.

V. CONCLUSION

There is new excitement among independent television stations. Fox has demonstrated that a new network competitive with the "big three" networks can be created and grow. UPN and WB are creating new programming and have established affiliations with a substantial number of independent stations. First run programming "has never been more in demand, more diversified or widely available, and more creatively amortized than it is today."²⁵ PTAR is a critical part


²⁴ "... [F]or want of a nail, the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost." Franklin, Benjamin, prefixed to *Poor Richard's Almanack* (1758).

²⁵ *Electronic Media*, "Programming boom spurring co-ventures", February 27, 1995, pp. 24, 26.

of this success. There is no public interest reason, at this time, to eliminate or revise PTAR while it is accomplishing precisely the goals established at its birth. It is more appropriate for the Commission to wait and see the effects of the elimination of the fin/syn restrictions and whether UPN and WB, as incipient networks, can grow and survive to bring first run programming to the public. Times of rapid change frequently incite change for change sake. This is a time when the Commission should permit the program production and distribution system to stabilize. The public interest deserves no less.

Respectively submitted,

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